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IN THE

Supreme Court of the United States

OCTOBER TERM, 1972

No. 73-42

RONALD MUHLETHALER,

Petitioner,

vs.

PEOPLE OF THE STATE OF ILLINOIS,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF ILLINOIS

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Now comes the Petitioner, Ronald Muhlethaler, by his attorneys, Benjamin S. Adamowski, Paul D. Newey, Robert E. Adamowski and Francis X. Riley, who prays that this Court issue its Writ of Certiorari to the Supreme Court of Illinois to review a final order of that Court, and alleges as follows:

OPINION.

The opinion of the Appellate Court is reproduced in Appendix A, and is reported *sub nom., People* v. *Muhlethaler* in 9 Ill. App. 3d 388; 292 N.E. 2d 438. The Supreme Court of Illinois denied Petitioner's request for leave to appeal. (*infra,* p. 7a)

JURISDICTION.

1. The final order of the Supreme Court of Illinois was issued on May 31, 1972. (See text, *infra,* p. 7a)

2. Jurisdiction of this Court is invoked to review that judgment pursuant to §1257(3) of the Judicial Code. (28 USCA)

QUESTIONS PRESENTED FOR REVIEW.

1. Is the offense of assault, exempt from this Court's demand for specifics in charging an offense, (*Russell* v. *United States,* 369 U.S. 749) on the ground that, the term "is one of common usage and understanding"?

2. Is a person informed of the nature and cause of the accusation, when charged under an Illinois statute for assault, making the subjective state of mind of another, ("reasonable apprehension") the essence of the offense?

3. Has *Russell* been obeyed when the People charged that this petitioner "engaged in conduct which put Ken Young in reasonable apprehension of receiving a battery", which are the words of the statute?

4. Does a charge of assault in the generic words of the statute, without specifics, satisfy the demands of the Sixth Amendment, that the petitioner "be informed of the nature and cause of the accusation"?

CONSTITUTIONAL PROVISION INVOLVED.

Amendment VI

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, *and to be informed of the nature and cause of the accusation*; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense. (Emphasized Phrase Applies Here)

STATEMENT OF THE CASE.

The complaint in this case (A. 1) is written totally in the generic words of the statute. Omitting the names of the defendant and the complaining witness, and the date and the address, there is not one single word in the charge which characterizes the defendant's conduct, or informs him of any offense he may have committed. Here are the charges and statute vis-a-vis:

The Statute[1]
(Ch. 38, Par. 12-1)

A person commits an assault, when, without lawful authority, he engages in conduct which places another in reasonable apprehension of receiving a battery.

(Ch. 38, Par. 12-2)

A person commits an aggravated assault when, in committing an assault, he: • • • (6) knows the individual assaulted to be a police officer, • • •

The Charge
(A. 1-2)

Ken Young • • • states Ronald Muhlethaler, on or about May 6, 1970 at 1122 South Halsted Street, Cook County, Illinois, • • • committed the offense of aggravated assault in that, he while committing an assault on Ken Young, that is without lawful authority, he engaged in conduct which put Ken Young in reasonable apprehension of receiving a battery, knew the said Ken Young to be a police officer, • • •.

When the case came on for trial the People furnished the defendant with an answer to a Motion to Produce, and a list of witnesses. (A. 2) The day the case was called for trial (AA. 1) defendant argued that his Bill of Particulars (Motion to Produce) had never been properly answered, and the failure to do so deprived him of the information necessary for him to prepare a defense. (AA. 2-22) The Court sustained People's objections to two requests for information, and obviously overruled defendant's objection to the other four (4) answers. (AA. 23)

---

[1] Ill. Rev. Stat. 1969.

The answer to number 5 is relevant to the issue here:

5. Place: Chicago Circle Campus *at approximately 1112 South Halsted,* Chicago, to-wit: a parking lot east of Halsted *across from 1112 S. Halsted*
Date: May 6, 1970
Time: Between the hours of 9:00 P.M. and 11:00 P.M. (Emphasis added)

The following day the trial began with the testimony of Officer Ken Young, of the Chicago Police Department, who had three years experience in the job. (A. 6) He said, that on May 6, 1970 he was ordered to the Chicago Circle Campus and arrived at 9 or 9:30, "that night." He was in uniform and with a partner. (*id.*)

When he arrived and was starting to enter, a group was forming behind the Campus ROTC building. He went in, cleared the building and made arrests. He then was ordered to back up the University police in taking two vans from the building. (A. 7)

He saw defendant in the ROTC parking lot. He told him to move or be arrested. He said, defendant called him "Pig" and several obscenities. Defendant continued walking backward, according to Young, who followed him to approximately the end of the parking lot. There, he said, defendant "bent down in a sweeping motion with his right hand, and picked up an assortment of rocks and in the same motion attempted to throw them." (A. 7)

On cross examination, he said, he followed the defendant and then added:

> "as the defendant removed himself, walking backwards, keeping an eye—there was a crowd. I stayed

within 4 to 5 feet of the defendant. At the time I told him to withdraw from my presence, there was nothing in his hand. And he withdrew himself. And I went in the same direction he was going.

There was no point in the 75 feet that he had anything in his hand. I had a baton in both my hands. A gun is part of my uniform. I had a gun. As I went forward, I held the baton in front of me. I had the baton at my chest, held steadily. The defendant went west in the parking lot. The parking lot is partially paved with asphalt. The last 6 feet of the parking lot are not paved.

There is not a walkway or sidewalk between the parking lot proper and the unpaved portion. There is not a curb between the paved and unpaved portions. There is a form of curb. It is a small ridge of concrete, approximately one inch in height. (A. 9) In the 75 feet that he retreated, he was facing me. He was walking backwards. When he came to the curb, he motioned—he picked up the rocks and attempted to throw them at me." (A. 10)

Officer Young said that defendant "didn't trip to my knowledge," rather "in a sense I knocked him down." (*id.*) Again, he said, "I knocked him down with my baton." (A. 10)

His partner, Harry Cerniak, (A. 14) in general corroborated the "handful of stones." (A. 16)

Four students testified for the defendant. (A. 20, 24, 27, 29) They testified to the scene, the defendant unarmed and peaceful. But, no one of them was aware of

the stone snatching episode. Nor as it turned out was the defendant.

The defendant said, as a student, he was at the scene legitimately, in his capacity as a sports reporter, whose office was in the building. (A. 36) He left the building for the lot when he was told those remaining would be arrested. (A. 36)

On direct examination he said:

> I certainly was unarmed. I had no club. I had no baton. I had no gun. He had a gun and a baton. I continued traveling backward but I didn't know how far it was at the time. I've been back to check it out and I came about 60 paces where I figure I initially met Mr. Young to a fence that was approximately 50 yards. When I met him he was right in front of me 4 or 5 feet away. We traveled in this direction all the way back to the fence. I fell as I approached the fence.
>
> I missed the exit, because I wasn't looking behind me too well, so, I didn't get out on Halsted Street.
>
> I tripped on the curb that was bordering the parking lot and against the fence. He didn't knock me down at that point. I tripped.
>
> As Mr. Young was only about 4 or 5 feet away from me, he had been saying, "Get moving," all along, he mentioned the fact that I was not moving. I was under arrest and the gap closed and I was getting up and he was helping me. He helped me up. He placed me under arrest at that point for not moving. My heel hit the curb and I, fell backward. That's when I stopped moving. I was going to get up but

> he helped me up. To my knowledge, I did not have anything in my hands when I got up. I didn't even know there were rocks there. I did not pick up gravel. I don't think I made any movement as though to throw anything. I had no intentions—I was trying to get up. That was all I was doing. (A. 33)

In rebuttal, Officer Young said: "The defendant was not struck subsequent to being placed under arrest." (A. 39)

The court found defendant guilty of aggravated assault and sentenced him to 60 days in jail.

ARGUMENT.

The petition for a writ of certiorari should be granted in this case, because:

1. The Supreme Court of Illinois, has held that an offense phrased in the words of the statute which particularizes the *offense,* satisfied the sixth amendment.

2. This nullifies *Russell* which declares that the accused had the right to have the conduct resulting in the charge, specified.

3. Under the Illinois statute where the offense of assault depends upon the state of mind of a third person; (i.e., "apprehension") and, which raises a defense measuring the "reasonableness" of that apprehension, an accused must know what his conduct was and where it occurred, in order to prepare his defense.

A reading of the foregoing statement clearly establishes that the charge as written, violates the Federal Constitution. (6th Amend.)

In defining the requirements of a criminal charge under the 6th Amendment, this Court has held that generic statutory language does not suffice. "It must descend to particulars," and "set forth all the elements necessary to constitute the offense * * *", (*Russell* v. *United States,* 369 U.S. 749, 765 (1961)) Here, the charge should have read, after the words "he engaged in conduct," (*supra,* p. 4) "that is, at the west fence of said location, he grabbed a handful of stones, and made a throwing ges-

ture, which, etc." This would have met the "specifics" of *Russell.* (369 U.S. at 765)

The failure to do so, caused defendant to produce two witnesses (Lamont, (A. 20) and Henke, (A. 24)) who did not witness that incident. Moreover, that failure caught defendant by surprise, because having been informed for the first time at trial, of the conduct upon which the People relied, he was unprepared to state with the certainty required at trial, as to his conduct at the crucial moment. (See, A. 33, R. 173, A. 38, R. 189)

In *Russell* v. *United States,* 369 U.S. 749, this court laid down the rules for the specific conduct required. It there said, at 765:

> It is an elementary principle, of criminal pleading, that where the definition of an offense, whether it be at common law or by statute, includes generic terms, it is not sufficient that the indictment shall charge the offense in the same generic terms as in the definition; but must state the specifics, it must descend to particulars'." *United States* v. *Cruikshank,* 92 U.S. 542, 558, 23 L. ed. 588, 593. An indictment not framed to apprise the defendant "with reasonable certainy, of the nature of *the accusation against him is defective, although it may follow the language of the statute." United States* v. *Simmons,* 96 U.S. 360, 362, 24 L. ed. 819, 820. "In an indictment upon a statute, it is not sufficient to set forth the offensive in the words of the statute, unless those words of themselves fully, directly, and expressly, without any uncertainty or ambiguity, set forth all the elements necessary to constitute the offense intended to be punished; . . ." *United States* v. *Carll,* 105 U.S. 611. "Undoubtedly the language of the statute may be used in the general description

> of an offense, but it must be accompanied with such a statement of the facts and circumstances as will inform the accused of the specific offense, coming under the general description, with which he is charged." *United States* v. *Hess,* 124 U.S. 483, 487. (Emphasis added)

By emphasis, this Court's attention is called to the charge, that the conduct occurred at "1122 South Halsted Street." (*supra,* p. 4) But here, the attempt to learn the details was not only untimely and frustrating, (Add. A. 2-5) but the material was partial and misleading. (Add. A. 26) The conduct of defendant, which the People relied upon, was denied him by the prosecutor and the court. (Add. A. 23)

The place of the crucial conduct was described as: "Chicago Circle Campus, at approximately 1112 South Halsted Street, Chicago, to-wit: a parking lot east of Halsted across from 1112 S. Halsted." (Add. A. 26) There are two basic errors in this one statement.

1. It contradicts itself, as being at 1112 and across the street from it.

2. The even numbers in the City of Chicago are on the west side of north-south streets. Thus, it could not be "east of Halsted."

Thus, not only did the charge deprive this petitioner of knowledge of his conduct constituting the offense, but when the legal mechanics were used to supply that lack, they were both misleading and withheld.

In denying the petitioner's appeal the Appellate Court of Illinois, relied solely upon *People* v. *Grieco,* 44 Ill. 2d 407; 255 N.E. 2d 897 (1970). That case, decided some ten

years after *Russell* equated it out of existence. The facts were that the defendant was indicted, in the following language:

> "The Grand Jurors chosen, selected, and sworn, in and for the County of Cook, in the State of Illinois, in the name and by the authority of the People of the State of Illinois, upon their oaths aforesaid present that on December 6, 1963, at and within said county, Joseph Grieco and Donald Grieco otherwise called Don Grieco, committed the offense of battery, in that they, intentionally and knowingly, without legal justification, committed a battery on George Quarnstrom which caused great bodily harm to said George Quarnstrom, in violation of ch. 38, §12-3, of the Ill. Rev. Stats., 1963, contrary to the statute, and against the peace and dignity of the said People of the State of Illinois." (255 N.E. 2d at 898)

In upholding the language of that charge the court reviewed and rejected *Russell*, among other cases. It then held:

> We are in accord with the holding of the appellate court that the indictment here meets the test for certainty evolving from the foregoing decisions. The term "battery" is one of common usage and understanding, and the statute itself sets forth all elements necessary to constitute the offense intended to be punished, viz., causing bodily harm to an individual, intentionally and knowingly without legal justification. Coupled with the allegations setting forth the name of the person upon whom the battery was committed, and the date it occurred, the indictment was sufficiently certain to enable defendant to prepare a defense and to permit any judgment entered to be pleaded in bar of a subsequent indictment for the same offense. (255 N.E. 2d at 899)

The foregoing, of course, violates *Russell* because it excerpts that part of *Russell,* which spells out "elements," and ignores that directive which demands "a statement of the facts and circumstances as will inform the accused of the specific offense." (369 U.S. at 765) But, this pitfall in *Grieco* is a maelstrom to this petitioner.

A battery is physical. An assault is not. The battery of Grieco was his blow to his result. The statutory assault here was "conduct," which caused another's reaction, which is the essence of the crime. But, this mental state may be defended against on "reasonable" grounds, if the "conduct" and the "mental state" are defined in the charge.

With apologies tendered in advance for its touch of earthiness, the following will illustrate the dichotomy suggested in the prior paragraph. When one man says to another: "Boy, did you scare hell out of me last night." And, the query in reply: "Yeah, what did I do?" A blow struck is evident to giver and receiver alike. But, conduct which creates a state of mind in a third person, may not only be unknown to the actor, but so may the state of mind.

Granted that "assault and battery" have walked the courts of law arm in arm for centuries, lawyers know that there is a difference. The law here in issue, when drafted drew extended comment, not only on the difference, but also because "reasonable apprehension" was added. (S-H Ann. Stat. 1969, Ch. 38, Par. 12-1, Comments) As the committee notes, *(id.)* the element which is added, raised also the defense of the "reasonableness of the apprehension." If the doer does not know what

specific deed of his produced this offending mental state, he cannot know in advance how reasonable the state of mind was, by the conduct belatedly revealed.

When a gesture is the conduct, done in a tableau of modified chaos, the accused must have prior notice of what gesture at what specific place, or his constitutional right of notice of his crime has been denied. Here, no such notice was attempted, was evident, or was even inferrable.

The petitioner is entitled to be heard on this issue, and not blanketed into a police record of an oppressive nature, without the opportunity to know before hand, and to defend intelligently against, specific criminal conduct.

CONCLUSION.

Wherefore, this petitioner prays that this court issue its Writ of *Certiorari* to the Court below, to reverse the judgment of conviction and sentence.

Respectfully submitted,

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APPENDIX A

Opinion of the Appellate Court of Illinois

Mr. Presiding Justice Dieringer delivered the opinion of the court:

The defendant, Ronald Muhlethaler, was charged in a complaint with the offense of aggravated assault. After a bench trial in the Circuit Court of Cook County, the defendant was found guilty of aggravated assault and the court imposed a sentence of sixty days in the county jail.

The issues presented on review are whether the complaint charging the defendant with aggravated assault was so vague that it failed to inform the defendant of the nature of the conduct which constituted the offense charged, and whether the defendant was proven guilty beyond a reasonable doubt.

On the evening of May 6, 1970, a crowd of approximately 200 people had formed in the parking lot of the ROTC Building on the University of Illinois Chicago Circle Campus. Officers Kenneth Young and Harry Cerniak of the Chicago Police Department were ordered to back up the University Police in helping disperse the crowd. At the time the crowd was ordered to disperse, Officers Young and Cerniak came in contact with the defendant. As the crowd was dispersing, the defendant remained and was told by Officer Young he would be arrested if he did not disperse. The defendant, after addressing certain abusive epithets to Officer Young, proceeded to withdraw with Officer Young following him.

(Appellate Court Opinion)

When the defendant reached the end of the parking lot, approximately 150 feet away, Officer Young testified the defendant "bent down in a sweeping motion with his right hand, and picked up an assortment of rocks and in the same motion attempted to throw them at me." Officer Young testified further he was afraid of being struck in the face because he was not wearing a faceguard. To avoid that possibility, he jabbed the defendant with his baton causing him to fall. Officers Young and Cerniak then arrested the defendant and as they attempted to place handcuffs on him, he started fighting and kicking. Subsequently he was handcuffed, placed in custody, and a complaint charging him with aggravated assault was filed. The complaint reads as follows:

> "Ken Young, complainant, now appears before the Circuit Court and in the name and by the authority of the People of the State of Illinois states that Ronald Muhlethaler has, on or about 6 May 1970, at 1112 South Halsted, Cook County, Illinois, committed the offense of Aggravated Assault in that he, while committing an assault on Ken Young that is without lawful authority he engaged in conduct which placed Ken Young in reasonable apprehension of receiving a battery, knew the said Ken Young to be a peace officer of the Chicago Police Dept. engaged in the execution of his official duties, in violation of Chapter 38, Section 12-2 (a)(6), Illinois Revised Statutes, and against the peace and dignity of the People of the State of Illinois."

During the course of the defendant's trial, the court heard the testimony of the arresting officers as to the defendant's

conduct on the evening in question. The court also heard the testimony of four defense witnesses who had been part of the crowd in the parking lot on the evening of the alleged incident. All four testified to seeing the defendant moving backward with Officer Young following. Two of the defense witnesses, Steven Letzsch and Richard Nitti, also testified they observed the defendant fall at the edge of the parking lot. They both admitted being friends of the defendant and denied seeing the defendant with any rocks in his hands.

In addition to the testimony of the defense witnesses, the court also heard the defendant's testimony wherein he admitted being in the parking lot on the evening in question, and also admitted calling Officer Young "an ass." The defendant, however, stated he did not bend down to pick up rocks at the edge of the parking lot. Rather, he stated he fell on the gravel at the edge of the lot as Officer Young followed him, and to his knowledge he did not have anything in his hand when he arose.

At the conclusion of the trial, the court found the defendant guilty of aggravated assault and sentenced him to sixty days in the county jail. The defendant herein appeals from this sentence.

The first issue presented for review is whether the complaint charging the defendant with aggravated assault was so vague that it failed to inform the defendant of the nature of the conduct of the offense charged.

The defendant claims the complaint in the instant case was written totally in the generic words of the statute which he was charged with violating and, as such, failed

to inform him of any offense he may have committed. Based on this assertion, the defendant contends the complaint clearly violates the Sixth Amendment of the United States Constitution and Article I, Section 8 of the Constitution of the State of Illinois, both of which insure a defendant be informed of the nature of the charge against him. In support of his contention, the defendant relies primarily on the decision in *Russell* v. *United States,* (1962) 369 U.S. 749, where the Supreme Court of the United States stated:

> "It is an elementary principle, of criminal pleading, that where the definition of an offense, whether it be at common law or by statute, 'includes generic terms, it is not sufficient that the indictment shall charge the offense in the generic terms as in the definition; but it must state the species,—it must descend to particulars.'"

In view of this language in *Russell* v. *United States*, the defendant urges this court accept his contention that the complaint charging him with aggravated assault was so vague it failed to inform him of the nature of his conduct which led to the complaint.

It does not appear the defendant's contention is well taken. The case which the defendant relies upon (*Russell* v. *United States*) does require a criminal complaint sufficiently specify the conduct which the defendant must defend against; however, the law in Illinois as to the requisite specificity of a criminal complaint is set forth in *People* v. *Grieco,* (1970) 44 Ill. 2d 407. The court in *People* v. *Grieco,* in affirming a conviction for battery, stated:

> "[A]n indictment phrased in the language of the statute creating the crime is sufficiently certain where the words of the statute so particularize the offense as by their use alone to notify the accused of the precise offense charged against him. (Citations omitted.) But where the statute does not specifically define the crime, or does so only in general terms, some act showing an alleged violation of the statute must be averred."

The court in *People* v. *Grieco* further stated the term "battery" is one of common usage and understanding, and is set forth as such in the statute. We believe the term "assault" is likewise of common usage and understanding, and the statute clearly sets forth the elements necessary to constitute the offense, namely, conduct which places another in reasonable apprehension of receiving a battery. The complaint in the instant case not only set forth these elements but also recited the date and place of the alleged assault, as well as the person against whom the assault was directed and the capacity in which he was acting. For these reasons we must reject the defendant's contention that the complaint against him was so vague it failed to inform him of the nature of the conduct of the offense charged.

The second issue presented for review is whether the defendant was proven guilty beyond a reasonable doubt. The defendant contends the State failed to prove him guilty of aggravated assault beyond a reasonable doubt. The basis for the defendant's contention is the assertion the State failed to prove an essential element of assault in that it did not prove Officer Young was placed in reasonable apprehension of receiving a battery. In further support of

this contention, the defendant relies on his own testimony to the effect he did not observe the manifestation of any fear on the part of Officer Young.

The record reflects Officer Young, in testifying to his confrontation with the defendant, stated he was afraid of being hit in the face because he had no faceguard. In view of this statement it appears the testimony of the defendant is in direct contradiction with Officer Young's version of the events on the evening in question as to the element of the police officer being placed in reasonable apprehension of receiving a battery. It is a well settled proposition of Illinois law that it is the province of the trier of fact, here the judge, to determine the weight and credibility of the witnesses who appear before the court. *People* v. *Glover*, (1971) 49 Ill. 2d 78. Furthermore, the testimony of a single witness, if it is positive and credible, is sufficient to convict, even though the testimony is contradicted by the accused. *People* v. *Webb*, (1972) 3 Ill. App. 3d 1012. There is nothing in the record, other than the defendant's testimony, that tends to contradict or make unbelievable the testimony of the arresting officer; nor is there any question he is a credible witness and his testimony is positive. In view of these facts, we will not substitute the judgment of the trier of fact with our own.

For the reasons stated herein, the judgment of the Circuit Court of Cook County is affirmed.

Affirmed.

BURMAN and ADESKO, JJ., concur.

APPENDIX B

Be It Remembered, that, to-wit: on the 31st day of May, 1973, the same being one of the days of the term of Court aforesaid, the following proceedings were, by said court, had and entered of record, to-wit:

• • • • •

And now on this day the Court having duly considered the Petition for Leave to Appeal herein and being now fully advised of and concerning the premises, doth overrule the prayer of the petition and denies Leave to Appeal herein.

• • • • •